Supreme Court, U.S.
FILED
JAN 15 1993
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No. _____

In The

Supreme Court of the United States

October Term, 1992

WADI KAHHAT, FARID KAHHAT,
MIRANDA KAHHAT, CARMEN KAHHAT,

Claimants-Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether after a failed forfeiture proceeding the Government is required to return interest on money that it unlawfully seized from an innocent family's interest-bearing bank account.

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The opinion and judgment of the United States Court of Appeals for the Ninth Circuit is reprinted in Appendix A. It affirms in part and reverses in part three orders of the United States District Court for the District of Hawaii. The two district court opinions necessary for this Court's determination are reprinted in Appendix B and Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on October 19, 1992. This Petition is filed within ninety (90) days of that date. This Court has jurisdiction to review the judgment on a petition for certiorari pursuant to Section 1254(1) of the Judicial Code (28 U.S.C. § 1254(1)).

STATUTES INVOLVED

The relevant statutory provision involved is 28 U.S.C. § 2465, which provides as follows:

> **§ 2465. Return of property to claimant; certificate of reasonable cause; liability for wrongful seizure**
>
> Upon the entry of judgment for the claimant in any proceeding to condemn or forfeit property seized under any Act of Congress, such property shall be returned forthwith to the claimant or his agent; but if it appears that there was reasonable cause for the seizure, the court

> shall cause a proper certificate thereof to be entered and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution.

STATEMENT OF THE CASE

In May, 1989, the Government took $572,426.63 from an interest-bearing account belonging to the Kahhat family. The Government then began civil forfeiture proceedings pursuant to Section 881 of Title 21 of the United States Code, falsely asserting that the Kahhats' account was controlled by a Peruvian drug dealer. Despite their protestations of innocence and full cooperation with Government agents, the Government relentlessly pursued the forfeiture action.

Finally, over one year later, the Kahhat family had its day in court. On August 8, 1990, the trial court entered summary judgment for the Kahhat family, holding that (a) there had been no probable cause for the seizure; (b) the Government had withheld pertinent exculpatory evidence from the magistrate who issued the initial seizure warrant; and (c) even after a year of discovery by the Government, it could not show probable cause to justify the seizure of the Kahhats' money. Notwithstanding these findings, the Government requested a "reasonable cause certificate." Not surprisingly, the district court denied this request, exposing the Government's agents to possible tort actions for their illegal seizure. In short, the Kahhats were completely innocent and the Government

was found to have had no justification, in law or in fact, for having taken the Kahhats' money.

After finding that no probable cause existed to seize the money or insulate the Government agents from liability, the district court inexplicably denied an award of attorneys' fees and expenses under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412. The court mistakenly concluded that, despite its own prior findings as recited above, the Government had nevertheless been "substantially justified" in its action. The district court further denied the Kahhats' request for prejudgment interest on the money that the Government had improperly seized and used for in excess of one year.

The Kahhats appealed this decision and the Ninth Circuit Court of Appeals reversed in part and affirmed in part. On the claim for attorneys' fees under EAJA, the circuit court recognized the obviously contradictory findings of fact of the district court and found that the Government's position was not "substantially justified." The court remanded the fee issue to the district court for further proceedings. The Ninth Circuit, however, continued to deny an award of prejudgment interest.

Thus, as matters stand, the Government has been permitted to illegally seize money from a bank account where it was earning interest, and, after using it for a year, return only the principal sum it seized, but not the lost interest. This cannot be the law. The Kahhats ask this Court to hear their claim for return of *all* the "property" that 28 U.S.C. § 2465 dictates should be returned.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it ignores the plain language of 28 U.S.C. § 2465, which requires the Government to return all of the "property" it has unlawfully seized. The decision below refuses to return the interest on the Kahhats' account based upon an irrational application of the "no-interest" rule as recently interpreted by this Court in *Library of Congress v. Shaw*, 478 U.S. 310 (1986). Additionally, the Ninth Circuit's decision conflicts with the Fourth Circuit's ruling in *In re Metmor Financial, Inc.*, 819 F.2d 446 (4th Cir. 1986), which held that innocent owners (lienholders) are entitled to prejudgment interest from the Government. Until the present decision:

- No court suggested that money seized and subsequently returned to innocent claimants need not include prejudgment interest.
- No court applied the sovereign immunity doctrine to allow the Government to keep interest on money it unlawfully seized from innocent claimants.
- No case held that the Government may unlawfully seize money from an innocent family's bank account, withhold a pertinent exculpatory fact, and relentlessly, but unsuccessfully, pursue a forfeiture action for over one year and then deny interest on the seized money.

Thus, the decision below radically alters the Government's statutory obligation to return all of the unlawfully seized property to innocent claimants. *See* 28 U.S.C. § 2465.

I. THE NINTH CIRCUIT'S DECISION THAT INNOCENT CLAIMANTS MAY BE DENIED THE RETURN OF INTEREST ON MONEY UNLAWFULLY SEIZED FROM AN INTEREST BEARING ACCOUNT IS CONTRARY TO PRINCIPLES ESTABLISHED BY THIS COURT.

The practical effect of the decision below is to reward overzealous and unfounded forfeiture actions by depriving the Petitioners (and all other innocent claimants) of the return of all of their property – in this case, the interest the money would have earned absent the Government's unjustified seizure. The Ninth Circuit, contrary to this Court's prior rulings, improperly expanded the doctrine of sovereign immunity to justify its unprecedented refusal to award prejudgment interest.

The notion that sovereign immunity precludes such return of property is wholly unfounded. A reading of this Court's decision in *Library of Congress v. Shaw,* 478 U.S. 310 (1986), reveals the irrational departure from the long-standing law of sovereign immunity. The first sentence of that opinion shows the extent of the Ninth Circuit's departure: "The no-interest rule is to the effect that interest cannot be recovered in a suit *against* the Government in the absence of an express waiver of sovereign immunity from an award of interest." *Library of Congress v. Shaw,* 478 U.S. at 311 (emphasis added). The forfeiture action here was not brought *against* the Government. More importantly, the return of the money by the Government was not the product of an action *against* the Government. Rather, pursuant to 28 U.S.C. § 2465, the money was returned at the end of the suit unsuccessfully prosecuted *by* the Government.

The decision below fails to recognize that the Kahhat family never sued the Government. Rather, the Kahhats merely requested that the Government return all of the "property" – principal and interest – that the Government unlawfully seized. Section 2465 of Title 28 of the United States Code requires nothing less; the seized property must be returned forthwith to the claimants. The Government's refusal to return the interest the money would have earned, purportedly supported by the "no-interest" rule of sovereign immunity, is wrong. If the Government's logic is followed, i.e., that "interest" is not to be returned to an innocent claimant, the Government could seize securities from an innocent claimant and, if the company declared a dividend, the Government would be justified in only returning the securities and retaining the dividends for the Government, as the dividends are "interest" on the stock. This result is absurd.

While the import of this Court's decision in *Library of Congress v. Shaw* has escaped the Ninth Circuit, other courts have understood that the return of property after a failed forfeiture properly includes an award of interest. *See, e.g., United States v. All Funds on Deposit in Any Accounts Maintained at Merrill Lynch, Pierce, Fenner & Smith*, 801 F.Supp. 984, 991 (E.D.N.Y. 1992) ("The claimants who met their burden at trial of proving the legitimate source of their funds will have their money returned to them without any other compensation except interest earned, less court fees for supervision of the funds."). Similarly, in the analogous motion for

return of property under Fed. R. Crim. P. 41(e), an award of interest is seemingly presumed. *See United States v. Farese*, 1989 WL 74963 (S.D.N.Y. 1989) (seized cash to be returned with interest); *In re Search of 4330 North 35th Street*, 142 F.R.D. 161, 171 (E.D. Wis. 1992) (cash seized from safe returned together with any interest earned). These cases do not abuse the doctrine of sovereign immunity to withhold interest from claimants.

The present claim for prejudgment interest, in fact, is far more compelling. First, the innocent claimants were the subject of an unlawful seizure. The Government never had probable cause to seize the funds. At the initial hearing, the Government withheld a pertinent exculpatory fact from the magistrate judge who issued the seizure warrant. Moreover, after one year of discovery, the Government still was unable to show probable cause for the seizure. Second, the money was not a bundle of cash in a duffel bag. Rather, pursuant to a deposit contract with Lloyd's Bank, the money was in an interest-bearing account. Under these facts, sovereign immunity is simply a red herring used by the Government to avoid its statutory obligation to return all of the property. This Court can end this irrational and unjustified expansion of sovereign immunity by awarding the Kahhat family prejudgment interest on the seized monies.

II. THE DECISION BELOW IS IN CONFLICT WITH THE FOURTH CIRCUIT'S DECISION TO AWARD PREJUDGMENT INTEREST TO INNOCENT OWNERS

In addition to misapplying this Court's precedent, the Ninth Circuit's decision to merely sweep away interest as barred by sovereign immunity conflicts with the Fourth Circuit's decision in *In re Metmor Financial, Inc.*, 819 F.2d 446 (4th Cir. 1986). In *Metmor*, the Government seized and forfeited a horse ranch pursuant to Section 881(a)(6) on the basis that the proceeds used to purchase it were from illegal drug activity. The innocent mortgagee of the forfeited property, whose mortgage lien attached before the wrongdoer purchased the property with drug money, sued to recover mortgage interest from the Government from the date of the seizure through the date the Government sold the ranch.

The Fourth Circuit allowed the recovery of interest by the innocent mortgagee. The court held that the Government took the property subject to the pre-existing mortgage because the Government, upon seizing the property, could acquire no interest greater than that held by the forfeiting owner. *Metmor*, 819 F.2d at 449. The court further held that the Government's stake in the property entailed an obligation to make continuing interest payments on the pre-existing mortgage. *Id.* at 450. The court concluded that the Government, by not making the mortgage payments on the forfeited property, essentially benefited from an interest-free loan. *Id.* at 451.

The innocent members of the Kahhat family, like the innocent lienholder in *Metmor*, had a right to receive

interest payments from their bank when their money was seized. "Where, as here, [an innocent owner's] stake encompasses a right to receive continuing interest payments on unpaid principal, . . . the innocent owner is entitled to receive such payments from the government, even after the property has been seized, until the principal is repaid." *Metmor*, 819 F.2d at 551; *see also United States v. Federal Nat'l Mortgage Ass'n.*, 946 F.2d 264, 267 (4th Cir. 1991) ("[T]he forfeiture to the government is subject to the lienholders' claims for principal, and pre- and post-seizure interest."). In short, funds unlawfully seized in an action in the Fourth Circuit accrue interest that is paid to the innocent owner, whereas funds unlawfully seized in an action in the Ninth Circuit do not.

Other circuit courts of appeal have followed *Metmor* and expanded upon its holding. *See United States v. Real Property Located at 2471 Venus Drive, Los Angeles, California*, 949 F.2d 374 (10th Cir. 1991); *United States v. Six Parcels of Real Property Situated in Blount County, Tennessee*, 920 F.2d 798 (11th Cir. 1991). In both decisions, the innocent lienholders were awarded prejudgment interest.[1] The courts, however, further awarded attorneys' fees and costs to the innocent lienholders because the loan documents provided the lienholder the right to recover such fees and costs. *See Real Property Located at 2471 Venus Drive*, 949 F.2d at 375; *Six Parcels of Real Property*, 920 F.2d at 794. Thus, the Fourth, Tenth and Eleventh Circuits provide innocent lienholders the entire benefit of their

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[1] Interestingly, in *Property Located at 2471 Venus Drive*, the Government actually *agreed* that the innocent lienholders were entitled to prejudgment interest and costs. 949 F.2d at 375.

bargain – the recovery of prejudgment interest and attorneys' fees and costs. Not surprisingly, none of these decisions mentions the completely irrelevant subject of sovereign immunity.

The Kahhat family, as innocent claimants, certainly is entitled to the entire benefit of the bargain to receive interest. It is undisputed that the seized monies were taken from an interest-bearing account at a bank. Prior to the seizure, the bank from which the Government seized the funds paid interest to the claimants under its depository agreement. The Kahhats' rights, consequently, included the right to receive interest on the seized funds. After the seizure, as in *Metmor,* the Government succeeded to the bank's responsibility under the agreement to pay interest to the innocent owners of the funds. The Government, accordingly, should have been ordered by the Ninth Circuit to pay the Kahhat family interest on the unlawfully seized funds.

CONCLUSION

Lacking any rational or principled basis of support, the decision below is clearly contrary to this Court's decision in *Library of Congress v. Shaw* and to precedent in the Fourth, Tenth and Eleventh Circuits. If allowed to stand, it will permit the Government to unlawfully seize money from interest-bearing accounts, use the funds as it sees fit, and eventually, perhaps years later, return only the principal sum. Sovereign immunity, the sole basis for denying an award of interest, has been transformed by the Ninth Circuit from a shield into a sword. According

to this Court, sovereign immunity precludes an award of interest on claims made *against* the Government. However, in the Ninth Circuit, sovereign immunity also precludes all awards of interest in failed forfeiture cases brought *by* the Government.

The completely innocent claimants here are akin to the innocent lienholders in the Fourth, Tenth and Eleventh Circuits, all of whom received prejudgment interest from the Government. In fact, the Kahhat family presents an even stronger claim for post-seizure interest – there was never probable cause to seize their funds. Pursuant to 28 U.S.C. § 2465, the Kahhat family is entitled to the return of all of their property – both principal and interest. Accordingly, this petition for writ of certiorari should be granted to address the Ninth Circuit's departure from this Court's jurisprudence and that of the other circuits.

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APPENDIX A

NOT FOR PUBLICATION

UNITES STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ALL MONIES ($572,426.63) IN ACCOUNT NO. 2785800-1 IN THE NAME OF WADI KAHHAT AND/OR ALL OTHER ACCOUNTS AND/OR JOINT ACCOUNTS AND/OR SAFE DEPOSIT BOXES OF WADI KAHHAT, AT LLOYDS BANK, MIAMI, FLORIDA, Defendant, WADI KAHHAT; FARID KAHHAT; MIRANDA KAHHAT; CARMEN KAHHAT, Claimants-Appellants.	No. 91-15847 D.C. No. CV 89-00387-HMF
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ALL MONIES ($572,426.63) IN ACCOUNT NO. 2785800-1 IN THE NAME OF WADI KAHHAT AND/OR ALL OTHER ACCOUNTS AND/OR JOINT ACCOUNTS AND/OR SAFE DEPOSIT BOXES OF WADI	No. 91-15944 D.C. No. CV 89-00387-HMF

KAHHAT, AT LLOYDS BANK, MIAMI, FLORIDA,

Defendant,

WADI KAHHAT; FARID KAHHAT; MIRANDA KAHHAT; CARMEN KAHHAT,

Claimants-Appellants.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALL MONIES ($572,426.63) IN ACCOUNT NO. 2785800-1 IN THE NAME OF WADI KAHHAT AND/OR ALL OTHER ACCOUNTS AND/OR JOINT ACCOUNTS AND/OR SAFE DEPOSIT BOXES OF WADI KAHHAT, AT LLOYDS BANK, MIAMI, FLORIDA,

Defendant,

WADI KAHHAT; FARID KAHHAT; MIRANDA KAHHAT; CARMEN KAHHAT,

Claimants-Appellants.

No. 91-16159

D.C. No. CV 89-00387-HMF

MEMORANDUM*

Appeal from the United States District Court
for the District of Hawaii
Harold M. Fong, Chief Judge, Presiding

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted May 7, 1992
Honolulu, Hawaii

Before: HALL, BRUNETTI, and LEAVY, Circuit Judges.

During the course of a drug investigation, the Drug Enforcement Administration ("DEA") seized bank accounts belonging to the Kahhat family. Following a determination of lack of probable cause for the seizure, the district court ordered the government to return the seized funds. The district court then ruled on various post-judgment motions filed by the parties. Four members of the Kahhat family (collectively "Kahhat") appeal from three discrete post-judgment orders entered by the district court. The orders appealed from are as follows: 1) the order denying Kahhat's motion for reconsideration of the court's decision not to award pre-judgment interest on the money seized and eventually returned by the government, 2) the order denying Kahhat's motions requesting attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412, and denying the imposition of sanctions under Fed. R. Civ. P. 11, and 3) the order granting the government's motion for reconsideration of the court's decision to award post-judgment interest on the money seized.

DISCUSSION

A. APPEAL NO. 91-15944

1. Attorneys' Fees Under 28 U.S.C. § 2412(d)(1)(A)

In case No. 91-15944, Kahhat appeals the district court's order denying his motion for attorneys' fees and sanctions. Kahhat challenges the district court's conclusion that the government was "substantially justified"

within the meaning of the Equal Access to Justice Act ("the Act"), 28 U.S.C. § 2412(d)(1)(A), when it seized his bank account and instituted forfeiture proceedings. Kahhat contends the district court's findings of fact concerning the government's conduct cannot be reconciled with its conclusion that the government's position was "substantially justified." We agree.

The government's position is "substantially justified" if it is " 'justified in substance or in the main' – that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). While the government is not required to prevail on the merits to establish that it was "substantially justified," *id.* at 569, it carries the burden of proving substantial justification. *United States v. $12,248 U.S. Currency*, 957 F.2d 1513, 1517 (9th Cir. 1992). To be substantially justified, the government's position must be more than "merely undeserving of sanctions for frivolousness." *Pierce*, 487 U.S. at 566.

Normally, the government must have probable cause to support a seizure for forfeiture of property. *See United States v. Dickerson*, 873 F.2d 1181, 1184 (9th Cir. 1988). The standard of probable cause to support a seizure for forfeiture is similar to that required to obtain a search warrant. *Id.* The government must have reasonable grounds to believe the property was related to a drug transaction, based upon sufficiently reliable information. *Id.* Mere suspicion is not enough. *Id.* If the original seizure was invalid, however, after-acquired untainted evidence may be considered to establish probable cause and allow the government to proceed with forfeiture. *United States v. One 1977 Mercedes Benz*, 708 F.2d 444, 450 (9th Cir. 1983), *cert. denied*, 464 U.S. 1071 (1984).

In its August 8, 1990 order granting Kahhat's motion for reconsideration of the denial of his motion for summary judgment and directing the government to return the seized funds, the district court stated: "Based on all the evidence presented, the court finds that, at the time of seizure, the government did not have probable cause to forfeit claimant Kahhat's monies." Later, in that same order, the district court stated: "Given the lack of evidence that any drug monies were transferred into claimant Kahhat's account even after considering the government's post-seizure evidence, the court finds that the government has failed to meet its burden of showing probable cause." Thus, according to the district court's order, probable cause for the seizure never existed.

Nevertheless, the district court found the government's position to be "substantially justified," and denied an award of fees. In its order denying the award, the district court stated: "The government's actions in this case were not the best planned, nor the best executed. However, this court at one time found that the government *did* have probable cause to seize [Kahhat's] funds. A later finding of no probable cause does not mandate a finding of no substantial justification."

It is undisputed that when the government applied for the seizure warrant it was aware of the exculpatory fact that Melendez was also using accounts of innocent businessmen to launder his drug money. While the government is not required to prevail on the merits in order to establish substantial justification, its conduct in withholding a critical exculpatory fact in order to seize the funds, and then relentlessly pursuing forfeiture, belies

the government's contention that its position was "substantially justified." *See, e.g., $12,248 U.S. Currency,* 957 F.2d 1517-18 (affirming district court's award of EAJA fees even though probable cause for the forfeiture); *United States v. One 1984 Ford Van,* 873 F.2d 1281, 1282 (9th Cir. 1989) (finding no substantial justification and reversing the district court's denial of EAJA fees even though the government prevailed on the merits in the district court, but lost on appeal); *United States v. Gavilan Joint Community College Dist.,* 849 F.2d 1246, 1248-49 (9th Cir. 1988) (finding no substantial justification and reversing the district court's denial of EAJA fees because the government pursued litigation in the face of a clear affirmative defense); *Cardwell v. Kurtz,* 765 F.2d 776, 782 (9th Cir. 1985) (finding no substantial justification and reversing the district court's denial of EAJA fees because the search warrant failed to satisfy the particularity requirement).

Under the circumstances, we conclude the district court abused its discretion when it denied the award of attorneys' fees to Kahhat on the ground the government was "substantially justified." Accordingly, we reverse that portion of the district court's order and remand the case to the district court for further consideration, including whether Kahhat is eligible to recover under the Act based on his net worth.

2. Rule 11

Kahhat contends the district court abused its discretion when it refused to impose Rule 11 sanctions against the government. He alleges that the government did not conduct a reasonable investigation prior to seizing his

funds. Kahhat also complains that the government did not accurately investigate the source of the allegation that he "bought his way out" of a prior drug related arrest.

Sanctions must be imposed on the signer of a paper if either 1) the paper is filed for an improper purpose, or 2) the paper is "frivolous." *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1990) (en banc). The court has discretion, however, to determine the appropriate sanction, including reasonable attorneys' fees. The standard governing both inquiries is objective. *Id.* A "frivolous" filing is one that is both baseless and made without a reasonable and competent inquiry. *Id.*

While the government ultimately failed to establish probable cause for the seizure, we cannot agree that its filings were baseless and made without reasonable inquiry. The district court did not abuse its discretion when it refused to impose Rule 11 sanctions.[1]

B. APPEAL NO. 91-16159

Jurisdiction for Post-Judgment Interest

In case No. 91-16159, Kahhat appeals the district court's order granting the government's motion for reconsideration of its March 14, 1991 order and vacating

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[1] Also, Kahhat vigoriously challenges the credibility of the information contained in Florence Nakakuni's affidavit. The district court denied his motion to strike the affidavit, and there has been no formal determination that the information contained therein was not credible. Thus, the district court did not abuse its discretion when it declined to impose sanctions for that filing.

the award of post-judgment interest. As a threshold matter, Kahhat contends the district court lacked jurisdiction to decide the government's motion for reconsideration of the award for post-judgment interest. According to Kahhat, the government's motion was filed beyond the ten-day period allowed by Fed. R. Civ. P. 59(e) and, therefore, it was untimely and could not be considered on jurisdictional grounds. Alternatively, Kahhat argues the district court could not decide the government's motion because a notice of appeal had already been filed and, therefore, the district court was divested of jurisdiction.

We note that neither party ever appealed from the underlying judgment in this case; namely, the district court's order finding no probable cause for the seizure and instructing the government to release Kahhat's funds. Consequently, the district court retained jurisdiction to consider post-judgment motions filed by the parties. While it is true that a properly filed notice of appeal will divest the district court of subject matter jurisdiction over the matter appealed from, *see, e.g., Sierra Pac. Indus. v. Lyng*, 866 F.2d 1099, 1113 (9th Cir. 1989), that did not happen in this case.

At the time the district court ruled on the government's motion for reconsideration, Kahhat had filed notices of appeal only from the district court's order denying his motion for reconsideration of the court's order declining to award pre-judgment interest (No. 91-15847), and the court's order denying an award of attorneys' fees and sanctions (No. 91-15944). In appeal No. 91-15847, Kahhat was appealing only the denial of his motion for reconsideration of the court's decision not to award *pre-judgment* interest. Neither party had appealed

from the district court's initial decision to grant post-judgment interest.

Each of the three orders appealed from in this case involve different discrete issues and separate orders dealing with the various motions filed by Kahhat and the government. At the time the court granted the government's motion for reconsideration seeking to vacate the award of post-judgment interest, Kahhat had not appealed from any order that granted him post-judgment interest. That matter was still with the district court. The court's order denying Kahhat post-judgment interest (No. 91-16159) was separate and apart from the previous orders Kahhat had appealed from. His appeal from the denial of a post-judgment interest award was timely and filed only after the court entered its final decision on that matter. We conclude the district court properly assumed jurisdiction to decide the government's motion filed pursuant to Fed. R. Civ. P. 60(b)(6).

C. APPEALS NOs. 91-15847/91-16159

Merits

Kahhat contends the district court erred when it denied both pre- and post-judgment interest on the ground of sovereign immunity. On appeal, all arguments presented by Kahhat apply equally to pre- and post-judgment interest. He sets forth four theories to support an award of interest for the period the government held his money. They include an estoppel theory, a takings theory, a fruit of a productive tree theory, and a contract theory.

Under the "no-interest" rule, interest cannot be recovered in a suit against the government in the absence of an express waiver of sovereign immunity. *Library of Congress v. Shaw*, 478 U.S. 310, 311 (1986). Interest may not be awarded against the government in the absence of express statutory or contractual consent. *Id.* at 314. If a question arises whether Congress has waived sovereign immunity in a particular instance, the court should construe the waiver strictly in favor of the government. *Id.* at 318.

There is no such express statutory basis for a waiver of immunity in this case. Section 2465 directs that "[u]pon the entry of judgment for the claimant in any proceeding to . . . forfeit property seized under any Act of Congress, such property shall be returned forthwith to the claimant." By its plain language, section 2465 does not authorize a waiver of the government's sovereign immunity from an award of interest. Nor may Kahhat reply on 28 U.S.C. § 1961,[2] for an award of post-judgment interest against the United States. *See, e.g., Bernardi v. Yeutter*, 951 F.2d 971, 976 (9th Cir. 1991) (Section 1961 does not constitute a waiver of sovereign immunity from interest awards.); *International Woodworkers of America v. Donovan*, 769 F.2d 1388, 1392 (9th Cir. 1985) ("[W]ith respect to attorney fee awards under the EAJA, there is no waiver of the government's immunity from interest in Section 1961, the EAJA or any other statute.").

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[2] Section 1961 provides, in part, that "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court."

Kahhat attempts to overcome the force of the "no-interest" rule by advancing various theories, which he contends either preempt the "no-interest" rule, or simply render the rule inapplicable because he is asking for a return of property, not interest. We find these contentions to be without merit under the particular circumstances of this case. Accordingly, the district court correctly declined to award Kahhat interest for the time period the government held his money.

Each party shall bear their own costs on appeal. The orders of the district court are

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff, vs. ALL MONIES ($572,426.63 IN ACCOUNT NO. 2785800-1 IN THE NAME OF WADI KAHHAT AND/OR ALL OTHER ACCOUNTS AND/OR JOINT ACCOUNTS AND/OR SAFE DEPOSIT BOXES OF WADI KAHHAT, AT LLOYDS BANK, MIAMI, FLORIDA, Defendants.	Civil No. 89-00387 HMF (Filed Apr. 23, 1991)

ORDER DENYING CLAIMANTS' MOTION FOR RECONSIDERATION

INTRODUCTION

On March 22, 1991, claimants filed a motion for reconsideration of the portion of this court's March 14, 1991 order which denied claimants pre-judgment interest. The government filed an opposition to the motion for reconsideration on April 1, 1991. In that opposition, the government requests that the court vacate its earlier award of post-judgment interest.

BACKGROUND

This case is one of 26 civil forfeiture actions. On August 8, 1990, this court entered an order in this case holding that the government had failed to establish probable cause to forfeit the defendant monies, and ordered the government to return the seized monies to the claimants.

The government returned the seized monies to claimants on or about September 10, 1990. On March 14, 1991, in response to claimants' motion, this court granted post-judgment interest to the claimants but denied pre-judgment interest.

DISCUSSION

I. Pre-judgment Interest

A case similar to the instant case but involving different claimants, the Abusadas, is assigned to United States District Court Judge David Ezra. Throughout this litigation, both the Abusadas and the Kahhats have filed similar motions in their respective cases. Judge Ezra also ordered that the government return the claimants' money; however, Judge Ezra so ruled because he found that the claimants were "innocent owners" under 21 U.S.C. § 881 (a) (6). Judge Ezra also denied pre-judgment interest, but later reconsidered that decision and *granted* the Abusadas pre-judgment interest in an order dated March 4, 1991.

The claimants in the instant case request this court to reconsider its prior ruling on the basis of the recent ruling

in the Abusada case.[1] In the Abusada case, Judge Ezra found the "lienholder cases" controlling and held that because the Abusadas were innocent owners they were analogous to innocent third party lienholders who are generally granted pre-judgment interest. Unlike the Abusada case, this court did not adjudicate the Kahhats to be innocent owners but instead found that no probable cause existed for the seizure of the defendant monies.[2] Therefore, this court does not find the claimants' request that the court adopt the recent Abusada ruling persuasive and DENIES the claimants' motion for reconsideration.

II. Post-judgment Interest

The government requested, in footnote 2 of its memorandum in opposition, that the court vacate its judgment of *post*-judgment interest. In support of this request, the government relies upon the "no-interest rule." *See, e.g. Library of Congress v. Shaw,* 106 S.Ct. 2957, 2960 ("The no-interest rule is to the effect that interest cannot be recovered in a suit against the Government in the absence of an

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[1] The claimants also move the court for discovery and an evidentiary hearing but offer no reasons in support of that request. The court DENIES such request because it finds no need for additional evidence in this case.

[2] The government appended a declaration by Emilio Melendez-Bernal, a participant in the Peruvian money laundering scheme, alleging that Wadi Kahhat was a knowing participant in the trading of "narcodollars" through the jungles of Peru. However, the innocent owner status of the Kahhats is not a question properly before the court at this time and therefore the court will not consider this accusatory information in the instant decision.

express waiver of sovereign immunity from an award of interest."). Although the *Shaw* case dealt with *pre*-judgment interest, *id.* at 2965, lower court cases have held that the no-interest rule applies to *post*-judgment interest as well. *International Woodworkers v. Donovan*, 769 F.2d 1388 (9th Cir. 1985); *Thompson v. Kennickell*, 797 F.2d 1015 (D.C. Cir. 1986).

The *Thompson* court detailed the legislative history of the Federal Courts Improvement Act, which amended 28 U.S.C. § 1961, and found that the amendments did not alter its previous holding in *Holly v. Chasen*, 639 F.2d 795 (D.C. Cir.) (per curiam), *cert. denied*, 454 U.S. 822 (1981), which found that the post-judgment interest rule did not apply against the United States unless explicitly waived by the government. Such waiver has been passed by Congress for cases under the Federal Torts Claims Act and the Tucker Act as well as in Court of Claims cases and Internal Revenue cases. *Thompson*, 797 F.2d at 1017. Waivers of sovereign immunity are to be strictly construed in favor of the sovereign. *Shaw*, 106 S.Ct. at 2963.

The government in this case did not research the law before it agreed that it was required to pay post-judgment interest, and now it asks, albeit in a footnote, that this court vacate its earlier ruling. Because the court does not currently have a proper motion for reconsideration of this issue before it, it declines to vacate its earlier order granting post-judgment interest to the claimants. However, the government is granted leave to file such a motion and the court will consider the same after the claimants have had an opportunity to respond.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, APR. 23, 1991

/s/ Harold M. Fong
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA v. ALL MONIES ($572,426.63) IN ACCOUNT NO. 2785800-1 IN THE NAME OF WADI KAHHAT AND/OR ALL OTHER ACCOUNTS AND/OR JOINT ACCOUNTS AND/OR SAFE DEPOSIT BOXES OF WADI KAHHAT, AT LLOYDS BANK, MIAMI, FLORIDA

Civil No. 89-00387 HMF

ORDER DENYING CLAIMANTS' MOTION FOR RECONSIDERATION

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff, vs. ALL MONIES ($572,426.63) IN ACCOUNT NO. 2785800-1 IN THE NAME OF WADI KAHHAT AND/OR ALL OTHER ACCOUNTS AND/OR JOINT ACCOUNTS AND/OR SAFE DEPOSIT BOXES OF WADI KAHHAT, AT LLOYDS BANK, MIAMI, FLORIDA, Defendants.	Civil No. 89-00387 HMF (Filed JUN 21, 1991)

ORDER GRANTING GOVERNMENT'S MOTION FOR RECONSIDERATION

INTRODUCTION

On March 22, 1991, claimants filed a motion for reconsideration of the portion of this court's March 14, 1991 order which denied claimants pre-judgment interest. The government filed an opposition to the motion for reconsideration on April 1, 1991. In that opposition, the government requested that the court vacate its earlier award of post-judgment interest. In this court's April 23, 1991 Order Denying Claimants' Motion for Reconsideration, the court granted the government leave to file a

motion for reconsideration on the post-judgment interest issue.

The government filed its motion for reconsideration on the post-judgment interest issue on April 25, 1991. The claimants filed their opposition to the motion on May 31, 1991 and the government filed a reply on June 12, 1991.

BACKGROUND

This case is one of 26 civil forfeiture actions. On August 8, 1990, this court entered an order in this case holding that the government had failed to establish probable cause to forfeit the defendant monies, and ordered the government to return the seized monies to the claimants.

The government returned the seized monies to claimants on or about September 10, 1990. On March 14, 1991, in response to claimants' motion, this court granted post-judgment interest to the claimants but denied pre-judgment interest.

DISCUSSION

The government requests that the court vacate its judgment of *post*-judgment interest. In support of this request, the government relies upon the "no-interest rule." *See, e.g. Library of Congress v. Shaw,* 106 S.Ct. 2957, 2960 ("The no-interest rule is to the effect that interest cannot be recovered in a suit against the Government in the absence of an express waiver of sovereign immunity from an award of interest."). Although the *Shaw* case dealt with *pre*-judgment interest, *id.* at 2965, lower court

cases have held that the no-interest rule applies to *post*-judgment interest as well. *International Woodworkers v. Donovan,* 769 F.2d 1388 (9th Cir. 1985); *Thompson v. Kennickell,* 797 F.2d 1015 (D.C. Cir. 1986).

The *Thompson* court detailed the legislative history of the Federal Courts Improvement Act, which amended 28 U.S.C. § 1961, and found that the amendments did not alter its previous holding in *Holly v. Chasen,* 639 F.2d 795 (D.C. Cir.) (per curiam), *cert. denied,* 454 U.S. 822 (1981), which found that the post-judgment interest rule did not apply against the United States unless explicitly waived by the government. Such waiver has been passed by Congress for cases under the Federal Torts Claims Act and the Tucker Act as well as in Court of Claims cases and Internal Revenue cases. *Thompson,* 797 F.2d at 1017. Waivers of sovereign immunity are to be strictly construed in favor of the sovereign. *Shaw,* 106 S.Ct. at 2963.

The Government in this case did not research the law when it originally agreed that it was required to pay post-judgment interest, but now, upon further research, asks that this court vacate its earlier ruling.

The law is clear that post-judgment interest is not to be awarded except where sovereign immunity has been expressly waived. Because awards of post-judgment interest have not been expressly provided for in forfeiture cases, the court finds that its earlier granting of post-judgment interest to claimants was in error and must be vacated.

The claimants argue that this court should not grant the government's motion because it was not filed within

10 days of the court's order granting post-judgment interest. However, as the government points out, the government filed its motion to reconsider upon leave of court.

The court may entertain a motion for relief from judgment or order under Fed. R. Civ. P. 60 (b) which provides as follows:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse part; (4) The judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time. . . .

This court notes that Fed. R. Civ. P. 60 (b) (6) is applicable in the instant case. The parties to this case have filed motions to reconsider at almost every turn. The court finds that to resolve the instant issue at the trial court level is reasonable and just given the clear state of the law on the point at hand.[1]

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[1] The claimants also argued that this court should not entertain the instant motion for reconsideration because they

Accordingly, the government's motion for reconsideration is GRANTED and the portion of its order of March 14, 1991 granting the claimants post-judgment interest is hereby VACATED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, Jun 21, 1991

/s/ Harold M. Fong
UNITED STATES
DISTRICT JUDGE

UNITED STATES OF AMERICA v. ALL MONIES ($572,426.63) IN ACCOUNT NO. 2785800-1 IN THE NAME OF WADI KAHHAT AND/OR ALL OTHER ACCOUNTS AND/OR JOINT ACCOUNTS AND/OR SAFE DEPOSIT BOXES OF WADI KAHHAT, AT LLOYDS BANK, MIAMI, FLORIDA

Civil No. 89-00387 HMF

ORDER GRANTING GOVERNMENT'S MOTION FOR RECONSIDERATION

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have filed a notice of appeal of the court's order denying them pre-judgment interest and therefore the appellate court should decide the instant issue. However, the claimants of course do not appeal the granting of post-judgment interest in their favor under the prior order of this court. In the interest of making the record clear and accurate at this level, the court entertains and grants the instant motion for reconsideration and vacates that portion of its earlier order granting the claimants post-judgment interest.

Supreme Court, U.S.
FILED
MAR 22 1993
OFFICE OF THE CLERK

No. 92-1234

In the Supreme Court of the United States

OCTOBER TERM, 1992

WADI KAHHAT, FARID KAHHAT, MIRANDA KAHHAT, AND CARMEN KAHHAT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States is liable for pre-judgment interest on monies it seized under 21 U.S.C. 881 but returned pursuant to 28 U.S.C. 2465.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1234

WADI KAHHAT, FARID KAHHAT, MIRANDA KAHHAT, AND CARMEN KAHHAT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) and the opinions of the district court (Pet. App. B1-B5 and C1-C5) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1992. The petition for a writ of certiorari was filed on January 15, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1989, the government suspected that Emilio Melendez-Bernal was conspiring to import cocaine

into the country. Gov't C.A. Br. 6. During the course of the investigation, the Drug Enforcement Administration (DEA) uncovered evidence that Melendez had been using bank accounts in the United States in connection with his drug trafficking. *Ibid.* Pursuant to 21 U.S.C. 881,[1] the government seized 23 bank accounts. Gov't C.A. Br. 6. An account belonging to the Kahhat family and holding $572,426.63 was one of the accounts seized. Pet. 2.

2. On August 8, 1990, the district court determined that there was no probable cause for forfeiture of the Kahhat account. Pet. App. B2. Pursuant to 28 U.S.C. 2465,[2] the court thus ordered the government to return the seized monies, which the government did. *Ibid.* The Kahhats then moved for pre-judgment interest; the district court denied the motion on the ground of sovereign immunity. *Id.* at A9. The court denied the Kahhats' motion for reconsideration. *Id.* at B3.

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[1] 21 U.S.C. 881(a)(6) authorizes the United States to forfeit

> [a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance, * * * [and] all proceeds traceable to such an exchange * * * except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

[2] 28 U.S.C. 2465 provides in relevant part: "Upon the entry of judgment for the claimant in any proceeding to condemn or forfeit property seized under any Act of Congress, such property shall be returned forthwith to the claimant."

3. The court of appeals affirmed the district court's decision not to award pre-judgment interest. The court noted that "[i]nterest may not be awarded against the government in the absence of express statutory or contractual consent." Pet. App. A10. And the court stated: "By its plain language, section 2465 does not authorize a waiver of the government's sovereign immunity from an award of interest." *Ibid.*

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. Petitioners contend (Pet. 5-7) that the government must pay pre-judgment interest on the monies it seized and later returned. That contention is erroneous.

a. "As sovereign, the United States, in the absence of its consent, is immune from suit." *Library of Congress* v. *Shaw*, 478 U.S. 310, 315 (1986). In addition, "[i]n the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." *Id.* at 314. In analyzing whether Congress has waived the immunity of the United States, this Court "must construe waivers strictly in favor of the sovereign." *Id.* at 318. The no-interest rule provides "an added gloss of strictness" upon the usual rule of construction concerning waivers of sovereign immunity. *Ibid.*; see also *Missouri* v. *Jenkins*, 491 U.S. 274, 281 n.3 (1989) ("ultrastrict" rule of statutory construction regarding waiver of immunity from interest).

b. The rule in *Shaw* controls here because the statutory provision governing the return of seized property does not contain any express authorization for awards of interest. Section 2465 of 28 U.S.C. states: "Upon the entry of judgment for the claimant in any proceeding to condemn or forfeit property seized under any Act of Congress, such property shall be returned forthwith to the claimant." As the court of appeals correctly observed, section 2465 "[b]y its plain language * * * does not authorize a waiver of the government's sovereign immunity from an award of interest." Pet. App. A10. The statute "contains no reference to interest. This congressional silence does not permit [this Court] to read the provision as the requisite waiver of the Government's immunity with respect to interest." *Shaw*, 478 U.S. at 319.

Petitioners nevertheless contend (Pet. 5) that the no-interest rule does not apply here because the *Shaw* rule is applicable only to suits brought *against* the government. The court of appeals correctly rejected this argument. In *Shaw*, this Court stated that "the United States is immune from an interest award" absent "express congressional consent to the award of interest." 478 U.S. at 314. An interest award is exactly what petitioners sought in this case.

Moreover, in analogous circumstances, Congress has expressly provided for interest on the return of property when it has intended such an award. For example, 26 U.S.C. 7426(g) provides for interest on funds that were seized by the Internal Revenue Service but then ordered returned by a court. The Court in *Shaw* cited 26 U.S.C. 7426(g) as an example of an express congressional waiver from sovereign

immunity with respect to interest and as support for the Court's conclusion that waivers should not be presumed absent such express language. 478 U.S. at 318 n.6.

Petitioners cite three district court cases for the proposition that "other courts have understood that the return of property * * * includes an award of interest." Pet. 6; see *United States* v. *All Funds on Deposit in Any Accounts Maintained at Merrill Lynch, Pierce, Fenner & Smith*, 801 F. Supp. 984, 991 (E.D.N.Y. 1992); *United States* v. *Farese*, No. 80 Cr. 063 (MJL) (S.D.N.Y. June 26, 1989); *In re Search of 4330 N. 35th Street, Milwaukee, Wisconsin*, 142 F.R.D. 161, 171 (E.D. Wis. 1992). In neither *All Funds* nor *Search of 4330 N. 35th Street*, however, did the district court discuss the government's immunity from claims for interest or even mention *Shaw*. In an unpublished opinion, the district court in *Farese* did address *Shaw*, but avoided the no-interest rule by characterizing the award of interest as damages due to the government's lengthy retention of Farese's property. That analysis is incorrect, as this Court made clear in *Shaw*: "the force of the no-interest rule cannot be avoided simply by devising a new name for an old institution." 478 U.S. at 321. Thus, "the character or nature of 'interest' cannot be changed by calling it 'damages,' 'loss,' 'earned increment,' 'just compensation,' 'discount,' 'offset,' or 'penalty,' or any other term, because it is still interest and the no-interest rule applies to it." *United States* v. *Mescalero Apache Tribe*, 518 F.2d 1309, 1322 (Ct. Cl. 1975), cert. denied, 425 U.S. 911 (1976) (cited with approval in *Shaw*, 478 U.S. at 321). In any event, any

conflict between that unpublished district court decision and the unpublished decision of the court of appeals in this case does not warrant this Court's review.

2. Petitioners contend that the decision of the court of appeals in this case conflicts with the Fourth Circuit's decision in *In re Metmor Financial, Inc.*, 819 F.2d 446 (1987).[3] That contention is erroneous.

Metmor did not address the issue involved in this case. The court of appeals in *Metmor* held that when the government seizes property subject to a pre-existing mortgage, the terms and conditions that run with the mortgage are valid as against the United States and, so far as concerns the real estate, the judgment of condemnation is against the equity of redemption only. 819 F.2d at 448. As a general rule, "a holder of the equity of redemption can redeem from the mortgagee only on paying the entire mortgage debt." *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 579 n.7 (1935). Thus, the court in *Metmor* concluded that where the government seizes property encumbered by a secured note, with interest accruing, the property owner's equity is "subject to an obligation to repay the borrowed principal *and* to

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[3] Petitioners also cite two decisions from other circuits and another decision from the Fourth Circuit that expressly rely on *Metmor*. *United States* v. *Real Property Located at 2471 Venus Drive*, 949 F.2d 374 (10th Cir. 1991); *United States* v. *Federal Nat'l Mortgage Ass'n*, 946 F.2d 264 (4th Cir. 1991); *United States* v. *Six Parcels of Real Property Situated in Blount County*, 920 F.2d 798 (11th Cir. 1991). Those cases are to the same effect as *Metmor*.

pay interest on the unpaid balance until all of the principal [is] repaid." 819 F.2d at 449.

The funds seized from petitioners' bank account were not encumbered by any pre-existing property interest. Nor do petitioners stand in the same position as mortgagees having a security interest limiting the extent of the property seized. Rather, petitioners seek to be compensated for the lost opportunity cost of their capital. As the Court stated in *Shaw*, "claims grounded on the belated receipt of funds" or for compensation for loss "stem[ming] from an opportunity cost" are simply claims for interest and, hence, are barred by the no-interest rule. 478 U.S. at 322. There is no conflict between *Metmor* and the decision of the court of appeals in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1993